United States Court of Appeals

for the Second Circuit



APPELLEE'S BRIEF

75-1179

B P/S

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

DOMINICK SANTIAGO,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

DAVID G. TRAGER,
United States Attorney,
Brooklyn, New York 11201.

DONALD F. McCAFFREY,
THOMAS GOLDSTEIN,
Special Attorneys,
Department of Justice,
Brooklyn, New York 11201.

JEROME M. FEIT,
DAVID E. ROSEBERRY,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

UNITED STATES COURT OF APPEALS
FILED
JUL 29 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

I N D E X

	Page
Issues presented ----------	1
Statutes involved ----------	2
Statement ----------	3
Argument:	
I. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION ----------	9
II. EVIDENCE OF PRIOR SIMILAR ACTS WAS PROPERLY ADMITTED AT TRIAL TO SHOW THE DEFENDANT'S INTENT, KNOWLEDGE AND WILLFULNESS IN REGARD TO SUBSEQUENT OFFENSES CHARGED IN THE INDICTMENT ----------	15
III. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN ITS INSTRUCTIONS TO THE JURY ------	19
IV. THE DEPARTMENT OF JUSTICE "SPECIAL ATTORNEY" WAS PROPERLY AUTHORIZED TO CONDUCT THE GRAND JURY PROCEEDINGS IN THE INSTANT CASE ----------	24
CONCLUSION ----------	28
CERTIFICATE OF SERVICE ----------	29

CITATIONS

Cases:

Beck v. United States, 298 F.2d 622 (9th Cir. 1962), cert. den., 370 U.S. 919 ----	24
Caldwell v. United States, 218 F.2d 370 (D.C.Cir., 1955), cert. den., 349 U.S. 930 ---	22
Davis v. United States, 411 U.S. 233 (1973) ----	25
Deck v. United States, 395 F.2d 89 (9th Cir. 1968) ----------	15

Cases continued: Page

DiGirlomo v. United States (8th Cir. July 18, 1975) ---------- 28

Goings v. United States, 393 F.2d 884 (8th Cir. 1968), cert. den., 393 U.S. 883 --- 24

Holland v. United States, 348 U.S. 121 (1954) -- 23

In re DiBella No. 75-1121 (2nd Cir. July 8, 1975) ---------- 26

In re Grand Jury Subpoena of Alphonse Persico, No. 75-2030 (2nd Cir. June 19, 1975)- 26

Michelson v. United States, 335 U.S. 469 n. 8 (1948) ---------- 15

Moore v. United States, 150 U.S. 57 (1893) ----- 15

United States v. Agrusa (8th Cir. July 18, 1975) ---------- 28

United States v. Birrell, 447 F.2d 1168 (2nd Cir. 1971) ---------- 15

United States v. Bryant, 430 F.2d 237 (8th Cir. 1970) ---------- 13

United States v. Byrd, 352 F.2d 570 (2nd Cir. 1965) ---------- 18

United States v. Clark, 475 F.2d 240 (2nd Cir. 1973) ---------- 24

United States v. DeCicco, 435 F.2d 478 (2nd Cir. 1971) ---------- 15

United States v. Dibrizzi, 393 F.2d 642 (2nd Cir. 1968) ---------- 13, 16, 24

United States v. Freeman, 498 F.2d 569 (2nd Cir. 1974) ---------- 14

United States v. Goad, 490 F.2d 1158 (8th Cir. 1974), cert. den., 417 U.S. 945 (1974)-14, 17

cases continued: Page

United States v. Harrelson, 223 F. Supp. 869 (E.D.Mich., 1963) ---------- 24

United States v. Kelley, 349 F.2d 720 (2nd Cir. 1965), cert. den., 384 U.S. 947 ---- 24

United States v. Marrapese, 486 F.2d 918, (2nd Cir. 1973), cert. den., 415 U.S. 994 (1974) ---------- 14

United States v. Ottley, 509 F.2d 667 (2nd Cir. 1975) ---------- 14, 17

United States v. Silverman, 430 F.2d 106 (2nd Cir. 1970) modified on other grounds 439 F.2d 1198 (2nd Cir. 1970), cert. den., 402 U.S. 953 (1971) ---------- 13, 16

United States v. Silvern, 494 F.2d 355 (7th Cir. 1973) ---------- 15

United States v. Taylor, 464 F.2d 240 (2nd Cir. 1972) ---------- 14

United States v. Tramunti, 500 F.2d 1334 (2nd Cir. 1974) ---------- 14

United States v. Turner, 423 F.2d 481 (7th Cir. 1970), cert. den., 398 U.S. 967 (1970) - 15

United States v. Wrigley (8th Cir. July 18, 1975) ---------- 28

Wakakson v. United States, 367 F.2d 639 (8th Cir. 1966), cert. den., 386 U.S. 994 (1967) ---------- 18

Statutes:

1 U.S.C. 1 ---------- 10

18 U.S.C. 2 ---------- 3

18 U.S.C. 371 ---------- 3

Statutes continued: Page

18 U.S.C. 664 ---------- 2, 3, 9, 19

18 U.S.C. 1027 ---------- 2, 3, 4, 10, 22

28 U.S.C. 515(a) ---------- 26

29 U.S.C. 439(c), 2 ---------- 3

29 U.S.C. 501(c) ---------- 3, 4, 12

Rules:

Rule 12(b)(2), F.R.Crim.P. ---------- 24

Rule 30, F.R.Crim.P. ---------- 19

Rule 52(b), F.R.Crim.P. ---------- 19

Miscellaneous:

H.R.No. 997 ---------- 9

1 U.S. Code Cong. and Adm. News, 1962 p. 1532-1536, 1538 ---------- 9

McCormick, Evidence §190 (1972) ---------- 15

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-1179

UNITED STATES OF AMERICA,
Appellee

v.

DOMINICK SANTIAGO,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

ISSUES PRESENTED

1. Whether the evidence was sufficient to sustain appellant's conviction.

2. Whether evidence of earlier similar acts was properly admitted to show the defendant's intent, knowledge and willfulness in regard to the offenses charged in the indictment.

3. Whether the trial court committed plain error in its instructions to the jury.

4. Whether the Department of Justice "Special Attorney" was properly authorized to conduct the grand jury proceedings in the instant case.

STATUTES INVOLVED

Title 29, United States Code, Section 501(c) provides:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or the use of another, any of the moneys, funds, securities,property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both (Pub. L. 86-257, title V, §501, Sept. 14, 1959, 73 Stat. 535).

18 U.S.C. 1027

> Whoever, in any document required by the Welfare and Pension Plans Disclosure Act (as amended from time to time) to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false,or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such Act or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such Act to be published or any information required by such Act to be certified, shall be fined not more than $10,000, or imprisoned not more than five years, or both. (Added Pub. L. 87-420, §17(c), Mar. 20, 1962, 76 Stat. 42).

18 U.S.C. 664

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act. (Added Pub. L. 87-420, §17(a), Mar. 20, 1962, 76 Stat. 41.)

STATEMENT

On July 25, 1973 the grand jury for the Eastern District of New York, which had considered evidence and testimony presented under the direction of Michael B. Pollack a Department of Justice "Special Attorney" assigned to the Organized Crime and Racketeering "Strike Force" in Brooklyn, New York, returned a fourteen count indictment naming appellant Santiago, Renee Siminofsky and Kenneth Bellsey as defendants. 1/

1/ The fourteen count indictment, filed on July 25, 1973, charged Santiago and Renee Siminofsky, the union welfare fund bookkeeper and secretary-treasurer of the union general fund, (who was tried with the defendant) with conspiracy (18 U.S.C. 371), five counts of conversion of union welfare funds (18 U.S.C. 664, 2), three counts of keeping false union records (29 U.S.C. 439(c), 2), and two counts of filing false walfare fund financial reports (18 U.S.C. 1027). Also charged with Santiago in the conspiracy count and one conversion count was Kenneth Bellsey (a union organizer and employee) who was granted immunity and testified at trial. Santiago was also charged individually, in one count of the indictment with conversion of union general funds (29 U.S.C. 501(c)). Count twelve (29 U.S.C. 439(c), 2) was dismissed prior to trial. Counts six (18 U.S.C. 664, 2) and eight (18 U.S.C. 664) were dismissed during trial (Tr. 1616, 1424). Renee Siminofsky was found not guilty on all counts. The defendant was found not guilty on the conspiracy count, two conversion counts and two false record keeping counts. References to the trial transcript will be "Tr." followed by the appropriate page in the 13 volume transcript which is paginated as follows: Volumes I and II are paginated with the prefix A and B respectively. Volumes II through XIII are consecutively paginated.

After a jury trial in the United States District Court for the Eastern District of New York (Hon. Thomas C. Platt, U.S.D.J. presiding), appellant Santiago (hereinafter defendant) was convicted of converting union welfare funds to the use of the union general fund in violation of 18 U.S.C. 664 (counts 4, 5, 7), converting union general funds to his own use in violation of 29 U.S.C. 501(c) (count 11) and filing false annual financial reports as to union welfare funds in violation of 18 U.S.C. 1027 (counts 9, 10). He was sentenced to concurrent terms of six months imprisonment to be followed by four and one-half years' probation on each of the six counts and was fined $500.00 each on counts 4, 5, 7 and $3000.00 each on counts 9, 10, 11.

1. The evidence at trial showed that during the period relevant to the indictment (1968-1972) (App. 10a-20a) the defendant was president of Local Union 3108, New York, New York (hereinafter union). The union was a labor organization engaged in an industry affecting interstate commerce within the meaning of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 501(c), 402(i)(j) and 439(c). He was also administrator/employee trustee of the Brotherhood Welfare Fund of Local Union 3108 (hereinafter "welfare fund"), a welfare fund within the meaning of the Welfare and Pension Plans Disclosure Act, 29 U.S.C. 304(b), 306, and 18 U.S.C. 1027 (Tr. A 28-30, 682, 894-901, 914). The defendant received an annual salary of approximately $10,000

and expenses as well as the use of an automobile as compensation for his services to the union (Tr. 932, G. Ex. 43, 44). The union was financed by the union general fund which consisted of the members initial membership fee and monthly dues, while the welfare fund was financed by a separate monthly fee for each employee. Separate bank accounts were maintained for the general fund receipts and the welfare fund receipts (Tr. B66-67, B72, 1206, 1270-1275, 1299).

The welfare fund was to be regulated by a board of trustees selected from management and labor (Tr. 1166-1168) which met quarterly (Tr. 1192).[2/]

The union and welfare fund, which shared office facilities, would send monthly billing statements to the employers of union and welfare fund members and receive in return checks for the amounts due. Some employers paid by means of separate checks for the union and welfare fund, others paid by a single check with notation as to how the payment was to be applied (Tr. 130-140, 309-319).

During the period from July to December 1968, when the union

2/ Evidence showed that the trustees often approved expenditures after they had been made and without particularization (Tr. 1170-1172, 1194, 1198) and that one trustee (Leo Tavormina a/k/a Tabbe) was in the practice of signing from one hundred to two hundred blank checks at a time for welfare fund expenditures (Tr. 1197-1198).

general fund was experiencing financial difficulties (Tr. 651-658, 1411-1443), certain employer's payments to the welfare fund were deposited in the union general fund and never transferred to the welfare fund. This abstraction of welfare funds occurred in a least three clearly identifiable instances. A check (G. Ex. 38) dated August 9, 1968, from Green Acres Bowl, which showed on its face that it was in payment of $543 in welfare dues, $240 in union dues and $25 in initiation fees was deposited in the union general fund and no part of it was ever transferred to the welfare fund (Tr. 309-319, 511-516, 593-600, 1264-1267). At least two checks from Caruso Foods (G. Ex. 26) dated September 20, 1968 and October 20, 1968 in the amounts of $1,000 and $1,500 respectively which were intended as welfare fund payments, and on which the notation "welfare" had been obliterated by an ink marking, were deposited in the union general fund and never transferred to the welfare fund (Tr. 136-139, 260-263, 523-564, 638-653, 701-707, 1266).

The testimony of accountants who audited the welfare fund account further showed that the defendant had signed and submitted annual (1968-1969) reports (D-2 forms), as required by the Welfare and Pension Plans Disclosure Act, which failed to disclose the three checks described above which should have been treated as welfare fund payments and placed in the welfare

fund. (Tr. A30, A43-44, 1217, 1235, 1241-1243, 1264-1275), as well as other welfare fund income.

The evidence further showed that during the period from December 1, 1970 to July 1, 1971 the defendant used welfare fund monies to make over $2,000 in salary payments to Kenneth Bellsey, a union organizer and business agent (see note #1) (Tr. 1053-1060, 1372-1395) for activities related to attempts to organize a union in the Washington D. C. area and union business activities in New York (Tr. 1054-1059).

With respect to the general fund of the union the evidence at trial showed that the defendant used monies of the general fund to pay for over $800.00 of unauthorized expenses (airline, hotel, and department store charges) which were unrelated to union affairs and in part involved trips to foreign countries. (Tr. 36-47, 36-47, 657-672).

The government also introduced evidence (the content of letters of February 17, 1970 and July 7, 1970 and a meeting on June 24, 1970) concerning the defendant's compromises with New York State Welfare Fund officials in which the defendant agreed to end a practice of paying for certain union expenses and activities with welfare fund monies. The evidence showed that the defendant knew that he faced possible civil and criminal penalties if his conduct of the welfare fund finances was not brought into conformity with the New York State insurance law

as to the legal use of welfare fund monies (Tr. 1341, 1348-49, 1562-1576) and the results of a subsequent audit showed that the defendant had not honored the compliance agreement (Tr. 1600-1615). The trial judge admitted the evidence as a showing of similar acts which were relevant to the defendant's intent, knowledge and willfulness in regard to counts one (conspiracy) and seven (payments to Kenneth Bellsey from the welfare fund from December 1, 1970 to July 1, 1971). The trial court instructed the jury, prior to and after its introduction, that the evidence was to be considered only for the limited reasons for which it was admitted (Tr. 1311, 1323-1324, 1337-1341, 1348-49, 1562-1563, 1597-1599, 1677).

2. The defendant presented evidence, by way of cross examination, that the Welfare Fund annual reports were prepared by an accountant (Tr. 1530), that the union general fund owed him a debt of $7,800 during 1968 and 1969 and that at one point in time he claimed to have made a payment to the union for a personal expense charged to it (Tr. 1533). He also contended that he had signed the welfare fund D-2 reports as a trustee rather than the welfare plan administrator (Tr. A46, B12).

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION

A. Counts 4, 5, 7 (18 U.S.C. 664).

Briefly the evidence shows that while the defendant was president of the union and administrator/trustee of the welfare fund, certain monies paid by employers for the welfare fund were instead placed in the union general fund where they remained. The evidence also showed that the defendant paid a union business agent and organizer with welfare fund monies.

The defendant contends that the evidence in regard to violations of 18 U.S.C. 664 is insufficient because the government did not prove that the defendant converted the welfare funds "to the use of another" within the meaning of the statute. This contention is based on the defendant's claim (Br. 28-30) that the union general fund should not be considered "another" within the meaning of 18 U.S.C. 664.

But the legislature history of 18 U.S.C. 664 clearly indicates that the purpose of the statute is to protect the financial integrity and safety of union welfare and pension funds from abuses by individials who are in control of such funds. See H.R. No. 997; 1 U.S. Code Cong. and Adm. News, 1962, p. 1532-1536, 1538. It is precisely that type of abuse which was shown by the evidence in the instant case.

Furthermore, the contention that in using the word "another" Congress intended to limit the application of the statute to "another person" (Br. 28) (individual or corporate) wholly overlooks the fact that Congress has expressly provided that the word "person" includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals" 1 U.S.C. 1. Therefore the defendant's claim that "another" means "another person" thus excluding the Union Welfare Fund is not well taken .

Moreover, the defendant was charged in the indictment with converting welfare fund monies "to his own use and the use of the Union general fund". There was sufficient evidence to show that the union general fund which paid the defendant's salary and expenses was kept financially solvent by the improper use of welfare fund monies thereby enabling the defendant to maintain his employment, salary and expenses; this clearly was a use of the welfare funds "to his own use" (Tr. 651-658, 1411-1443).

B. Counts 9 and 10 (18 U.S.C. 1027).

The evidence detailed in the statement showed that the defendant signed and submitted Welfare Fund Annual Financial reports for 1968 and 1969 which understated the payments which were made to the welfare fund for those years.

The contention (Br. 29-31) that the evidence in regard to

the false reports was insufficient because the employees actually deposited incoming funds and the annual reports were prepared by an accountant is unpersuasive. The evidence showed that the defendant was the administrator/trustee of the welfare plan (Tr. A-30) and as such was responsible for the receipt, control and expenditure of funds of the plan (Tr. A43, 894-895). The testimony of the accountant who was employed by the welfare fund showed that the defendant hired him in 1966 to prepare federal reports and various financial reports but that he was not employed to audit the books of the welfare fund (Tr. 1515-1519). The accountant also stated that he prepared the welfare fund annual financial reports in question, but was not employed to verify the accuracy of the reports by an audit (Tr. 1519-1521). During the period 1968-1969 the defendant told the accountant that if there were any mixups between the Welfare and General funds, in regard to credit-card charges, he (the defendant) would straighten them out (Tr. 1522). Moreover the testimony of two of the trustees of the welfare fund showed that the defendant had reduced the trustee's role to mere consent to the defendant's actions (Tr. 1170-1172, 1194, 1197-1198).

The defendant signed the annual reports in question and indicated that he was signing as a trustee (Tr. A46-A47) below the administrator's oath on the form (Tr. B45-B46). The use

of the word trustee following his signature on the form is insignificant in light of the fact that he occupied the position of the administrator as defined by statute (29 U.S.C. 304) and was responsible for filing the annual reports (Tr. B48, 894-902).

Clearly the jury was provided with a factual foundation from which it could conclude that the defendant knowingly made the false statement in the annual reports. The fact that the defendant employed an accountant to aid in the preparation of the forms but not to verify the accuracy of the information, neither relieves the defendant of the administrator's responsibilities in regard to the reports nor indicates any lack of knowledge on the defendant's part.

C. Count 11 (29 U.S.C. 501(c))

The evidence as detailed in the statement showed that the defendant paid for a number of unauthorized personal and non-union expenses with funds from the union general fund (Tr. 36-47, 657-672).

The defendant contends, however, (Br. 31) that this evidence is insufficient to sustain his conviction because the union financial statements for 1968 and 1969 showed that the union owed him a debt of $7,800.00 and that there was insufficient proof that expenses were not valid and/or ratified at a time subsequent to the records disclosed at trial. This contention is without merit.

The fact that evidence was introduced which indicated that the union owed the defendant a debt of $7,800 does not absolve him of liability for the conversion of union funds. There was no evidence that the defendant was in fact drawing funds against the debt owed him, nor was there any evidence that the amount owed the defendant was decreased as he used union funds to pay personal expenses. The evidence clearly showed that the payment of the expenses was not properly authorized and was for non-union purposes (Tr. 657-672). See United States v. Bryant, 430 F.2d 237 (8th Cir., 1970). Moreover the defendant's suggestion that the personal and/or non-union expenses might have been ratified subsequent to the time the expenses were incurred is unsupported by any evidence and would not have altered the personal non-union nature of the expenses which clearly provided sufficient evidence of criminal intent. See, United States v. Dibrizzi, 393 F.2d 642, 645 (2nd Cir. 1968). The defendant's claim that there is no proof in the record that the expenses were not "valid" (Br. 31) ignores both the evidence of a lack of authorization and the character of the expenses which the jury found to be of a personal nature after hearing sufficient evidence that the expenses were unrelated to union business (Tr. 657-672). See United States v. Silverman, 430 F.2d 106 (2nd Cir. 1970) modified on other grounds 439 F.2d 1198 (2nd Cir. 1970) cert. den., 402 U.S. 953 (1971); United States v.

Goad, 490 F.2d 1158 (8th Cir. 1974), cert. den., 417 U.S. 945 (1974); United States v. Ottley, 509 F.2d 667 (2nd Cir. 1975).

In sum, the evidence on all of the counts of which the defendant was convicted, together with all legitimate inferences that may be drawn, (United States v. Marrapese, 486 F.2d 918, 921 (2nd Cir. 1973), cert. den., 415 U.S. 994 (1974)), viewed in the light most favorable to the government was sufficient to enable a reasonable mind to fairly reach a conclusion of guilt beyond a reasonable doubt and was therefore sufficient to sustain the defendant's conviction. See United States v. Tramunti, 500 F.2d 1334, 1338 (2nd Cir. 1974); United States v. Freeman, 498 F.2d 569, 571 (2nd Cir. 1974); United States v. Taylor, 464 F.2d 240, 243 (2nd Cir. (1972).

II

EVIDENCE OF PRIOR SIMILAR ACTS WAS PROPERLY ADMITTED AT TRIAL TO SHOW THE DEFENDANT'S INTENT, KNOWLEDGE AND WILLFULNESS IN REGARD TO SUBSEQUENT OFFENSES CHARGED IN THE INDICTMENT

Evidence of misconduct for which a defendant is not then on trial is, of course, not admissible merely to show disposition to commit a crime. But when the evidence is relevant to any of the issues properly before the jury, its prejudicial effect may be outweighed by its probative value, in which case it may be admitted at the discretion of the trial judge. Among such issues are motive, knowledge or state of mind, intent, absence of mistake or accident, identity, and common scheme or plan embracing the commission of two or more criminal acts so interrelated that proof of one tends naturally to establish the other. See McCormick, Evidence §190 (1972). See e.g., Moore v. United States, 150 U.S. 57 (1893); Michelson v. United States, 335 U.S. 469, 475-476, n.8 (1948); United States v. Silvern, 494 F.2d 355, 360 (7th Cir. 1973); United States v. DeCicco, 435 F.2d 478, 483 (2nd Cir. 1971); see also United States v. Birrell, 447 F.2d 1168 (2nd Cir. 1971); Deck v. United States, 395 F.2d 89, 91 (9th Cir. 1968); United States v. Turner, 423 F.2d 481 (7th Cir. 1970), cert. den., 398 U.S. 967 (1970).

The trial court in the instant case admitted evidence, of the defendant's compromise with New York State Welfare Fund officials which was prompted by the presence of possible civil and criminal penalties for the misuse of welfare fund monies (Tr. 1341, 1348-49, 1562-1576). The evidence of the compromise and the circumstances surrounding it covered the period from February to July, 1970 and were admitted as evidence relevant to the defendant's intent, knowledge and willfulness in regard to counts one (conspiracy) and seven (improper abstraction of welfare fund monies) which concerned a period following the compromise. The trial judge instructed the jury, prior to and after the introduction of the evidence, that the evidence was to be considered only for the limited reasons for which it was admitted (Tr. 1311, 1323-1324, 1337, 1341, 1348-1349, 1562-1563, 1597-1599, 1677).[3/]

Clearly the defendant's intent and knowledge were relevant to the charges of improper abstraction of welfare funds and conspiracy to so abstract. See United States v. Dibrizzi, 393 F.2d 642 (2nd Cir. 1968); United States v. Silverman, 430 F.2d

3/ The defendant directs attention to the trial judge's original impression that the government intended to introduce the similar act evidence as relevant to all counts of the indictment and his statement of that belief (Tr. 1550) (Br. 34). That statement however was not made in the presence of the jury.

106 (2nd Cir. 1970) modified on other grounds, 439 F.2d 1198 (2nd Cir. 1970), cert. den. 402 U.S. 953 (1971); United States v. Goad, 490 F.2d 1158 (8th Cir. 1974) cert. den., 417 U.S. 945 (1974); United States v. Ottley, 509 F.2d 667 (2nd Cir. 1975).

The defendant's contention (Br. 35-36) that the evidence was not relevant because the compromise was negotiated with state officials rather than the federal government is unpersuasive in that the similar nature of the act depends upon the conduct involved, not whether the threat of a criminal sanction is imposed by the state or federal government. Nor did the evidence confuse the jury or the issues involved in the trial as the defendant contends (Br. 36). The trial judges instructions were clear and timely and enabled the jury to make the proper use of the evidence. 4/

4/ The defendant's suggestion (Br. 35) that the jury was improperly instructed that they could "consider the evidence as to an alleged earlier or later offense of a like nature in determining the state of mind, knowledge, intent or wilfullness with which the accused did the act charged in the indictment" (Tr. 1872) because the instruction did not distinguish between prior and subsequent acts is insubstantial.The instruction was proper in light of the previous specific limiting instructions in regard to the evidence of the state compromise which served to clearly distinguish and limit the use of that evidence.

It is clear that the trial judge correctly balanced the possible prejudicial effect of the evidence of other misconduct against its probative value and acted within his discretion in determining that the evidence was relevant to central issues and therefore admissable. See United States v. Byrd, 352 F.2d 570, 575 (2nd Cir. 1965); Wakakson v. United States, 367 F.2d 639, 645 (8th Cir. 1966), cert. den., 386 U.S. 994 (1967).

III

THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN ITS INSTRUCTIONS TO THE JURY

Although the defendant failed to comply with the mandate of Rule 30, F.R.Crim.P., that any portion of the court's instructions which are to be assigned as error must be distinctly objected to and that the grounds of the objection be stated (See Tr. 1799-1825, 1884-1889), he now contends that the instructions contained "plain error" cognizable under Rule 52(b), F.R.Crim.P. This contention is incorrect.

1. The defendant contends (Br. 37-39) that the trial court erred in not instructing the jury that to find a violation of 18 U.S.C. 664 they must first find that the General Union Fund was "another" within the meaning of the statute and that the trial court did not clearly instruct that in order to find the defendant guilty they must find that he converted Welfare Funds "to his own use or that the defendant converted Welfare Funds to the use of another."

As a result of examining isolated sections of the court's charge on the 18 U.S.C. 664 counts, the defendant concludes that the court misstated the law and removed from the consideration of the jury essential elements which should have been left for their evaluation and judgment. (See Br. 38-39).

It is clear, however, that the instructions on the 18 U.S.C. 644 counts, when viewed as a whole, correctly present the law

and properly set forth what is necessary for the jury to determine in order to find the defendant guilty. The court instructed the jury as follows (Tr. 1833, 1836, 1855-1859) (App. 33a, 36a, 55a-60a):

> Counts two to five charge both defendants with embezzling, stealing or unlawfully and willfully abstracting and converting to their own use or to the use of others money or property of the Welfare Fund.
>
> * * * * *
>
> I will read to you Section 664, but bear in mind that it again is repeated in Counts 2 to 5 and Count 7. So I won't read it again after that. It's also charged in Count 1 to have been violated.
>
> That reads:
>
> "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the monies, funds, securities, premiums, credits, property or other assets of any employee welfare benefit plan or employee pension benefit plan," shall be in violation of the law.
>
> * * * * *
>
> Now, the following are the essential elements of the crime charged. I am not going to repeat these after Counts 3, 4, 5 and 7. So listen to them because they are applicable to each one of those counts. I will give you a brief description of the other counts, but the essential elements, I will not go through again.
>
> The following are the essential elements of the crime charged which must be proven beyond a reasonable doubt:
>
> One. Embezzlement or a stealing or unlawful and willful conversion or abstraction of welfare funds by the accused.
>
> You noticed I put in "or." I defined those terms for you heretofore.

Two. A fraudulent intent on the part of the accused to deprive the Welfare Fund of its funds.

Three. A lack of bona fide authorization to the accused to deal with the funds as they did, or a lack of bona fide ratification of their acts by the trustees of the fund pursuant to the Welfare Fund's trust agreement.

Four. A lack of benefit to the Welfare Fund.

With respect to the question of bona fide authorization or ratification by the trustees, the fiduciary responsibility imposed upon the defendant Santiago by the law requires the defendant Santiago to follow the proper procedures to authorize or ratify properly the funds. A Welfare official cannot be acting in good faith when not following his Welfare Fund's procedures for properly authorizing or ratifying expenditures. An elected Welfare official must know the proper procedures for conducting his Welfare Fund's business.

If, however, the accused in good faith believe that the funds were being used for Welfare Fund business and that the trustees had properly authorized the expenditures or would properly ratify them, then they did not violate the law and should be acquitted on this count.

And also the same would apply to Counts 3, 4, 5, and 7, as I indicated to you.

With respect to the language contained in the statute, "to his own use," or "to the use of another," you are instructed that the term, "to his use," or "to the use of another," does not require a showing that the money or property was appropriated to the personal use of the defendants; rather, it can mean that the money or property was used for purposes other than those purposes which the contributor intended it to be used for.

And particularly, you will recall here the Government claims that in Counts 2 through 5, I believe, that they were used, and they were diverted to the Union fund in Count 7, as I recall, that is the count

that pertains to the diversion of the funds to Mr. Bellsey, the business agent for the Union.

The defendant Dominick Santiago, as a trustee of an employee benefit plan, is held to a strict fiduciary duty to use those Welfare funds only in accordance with the trust agreement setting up the fund solely for the exclusive benefit of the employees and their dependents, and not for the benefit of the Union.

The fund is in no way an asset or property of the Union.

Any breach of this fiduciary duty by the defendant Dominick Santiago where you find that he acted with fraudulent intent and without proper authorization or in a manner that did not benefit the Welfare Fund, then you must find him guilty of violating 18 U.S.C. Code Section 664, bearing in mind all that I have given you by way of instructions in this section.

The instructions were thus neither confusing nor one-sided. Moreover any question as to whether the union general fund was "another" within the meaning of the statute was a question of statutory construction which could not properly have been submitted to the jury. See Caldwell v. United States, 218 F.2d 370 (D.C. Cir., 1955) cert. den., 349 U.S. 930,

Further, the defendant's suggestion that the trial court erred in submitting the case to the jury in the terms of the indictment "to his own use or the use of another" is unfounded. As pointed out in Argument I there was sufficient evidence to sustain a conviction on either theory.

2. The defendant's claims of error in regard to the court's instruction on violations of 18 U.S.C. 1027 (Br. 40) are

similarly unfounded. The fact that the annual report of the union welfare fund was a document required by the Welfare and Pension Plans Disclosure Act was stipulated to (Tr. A30) and the jury was advised of that fact (Tr. 1834-1835) (App. 34a-35a).

As to the defendant's claim that the court failed to instruct the jury as to the precise falsehood which was contained in the annual reports, the record clearly shows that the court informed the jury of the specific false statements alleged and the amounts involved (Tr. 1860-1862, App. 60a-62a).

The court's instruction to the effect that the defendant's reliance upon the work of an accountant, who was not employed to verify or certify the forms he completed for the defendant, was not a valid defense, was correct in that the responsibility for the reports was clearly the defendant's and the testimony of the accountant left no doubt that his role in the preparation of the annual report was merely a superfical completion of forms. Moreover, the defendant's suggestion that this instruction removed from the consideration of the jury the question of the defendant's criminal intent is unfounded.

The instructions as a whole were clear, accurate, complete, comprehensible and set forth the essential elements of the alleged crimes which must be proved by the government beyond a reasonable doubt. See Holland v. United States, 348 U.S. 121,

138 (1954); United States v. Clark, 475 F.2d 240 (2nd Cir. 1973); Cf. United States v. Dibrizzi, 393 F.2d 642 (2nd Cir. 1968); United States v. Harrelson, 223 F. Supp. 869 (E.D. Mich., 1962). See also Goings v. United States, 393 F.2d 884 (8th Cir. 1968), cert. den., 393 U.S. 883; United States v. Kelley, 349 F.2d 720 (2nd Cir. 1965), cert. den., 384 U.S. 947; Beck v. United States, 298 F.2d 622 (9th Cir. 1962), cert. den., 370 U.S. 919.

IV

THE DEPARTMENT OF JUSTICE "SPECIAL ATTORNEY" WAS PROPERLY AUTHORIZED TO CONDUCT THE GRAND JURY PROCEEDINGS IN THE INSTANT CASE

The defendant contended for the first time after the jury had returned its verdict that the indictment should be dismissed because the Department of Justice "Special Attorney" who presented evidence to the grand jury in the instant case was allegedly not properly authorized to appear before the grand jury, thereby invalidating the proceedings and the indictment.

It is clear that this motion should have been presented prior to trial and failure to present the motion in a timely manner constitutes a waiver of the objection. Rule 12(b)(2), F.R.Crim.P. provides in pertinent part that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment. . . may be raised only by motion before trial," and that failure to present such

defenses or objections "constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." In Davis v. United States, 411 U.S. 233, 236-237 (1973), the Supreme Court held that this rule "applies to both procedural and constitutional defects in the institution of prosecutions which do not affect the jurisdiction of the trial court." It, therefore, concluded that a post-conviction claim of unconstitutional discrimination in the composition of the grand jury was waived.

The claim here - that the government attorney was not authorized to present the case before the grand jury - is also the type of claim that should have been presented prior to trial. An examination of the Advisory Committee's Notes to Rule 12(b)(2), shows that the drafters meant to include the objection made here within this Rule. The Notes state in pertinent part:

> All such defenses and objections must be included in a single motion . . . Among the defenses and objections in this group are the following: Illegal selection or organization of the grand jury . . . presence of unauthorized persons in the grand jury room, other irregularities in the grand jury proceedings. . .

In light of this Rule, appellants' objection to the authority of the government attorney has been waived. In any event, the contention is without merit.

The "special attorney" who conducted the grand jury proceedings challenged by the defendant was acting under the

authority granted by a commission signed by the Deputy Attorney General (App. 21a).

The defendant challenges the "special attorneys" commission as "overbroad" and not "specifically directed" as required by 28 U.S.C. 515(a). The defendant bases his contention on a narrow interpretation of the statute authorizing the appointment of "special attorneys" and the fact that while the commission sets forth with particularity a number of statutory violations to which the special attorney was to direct his efforts and includes direct reference to "other criminal laws of the United States" the commission does not specifically mention the offenses for which the defendant was indicted. This challenge to the "special attorney's" authority is without merit.

In In re Grand Jury Subpoena of Alphonse Persico, No. 75-2030 (2nd Cir. June 19, 1975), and In re DiBella No. 75-1121 (2nd Cir. July 8, 1975) this Court considered and rejected an identical contention involving a similar commission (the commission in Persico, supra. did not include references to specific statutory offenses but, as the commission in the instant case, directed the special attorney to concern himself with "violations of federal criminal statutes." (Persico, slip op. 5)).

We submit that this Court's comprehensive analysis of the operation of Department of Justice "strike forces" and "special attorneys" in Persico, supra. clearly answers the defendant's

contention in the instant case. [5]

This Court found in Persico, supra. a commission, such as the one at issue here, "does not begin to express the limitations on [the "special attorney's"] authority, Persico, supra. slip. op. 19, and "A Strike Force attorney no matter how broad his commission, is under virtually constant specific direction and control" Persico, supra. slip. op. 20. This court further found that 28 U.S.C. 515(a) should not be "construed as to interfere with the federal government's ability to efficiently administer its criminal laws" Persico, supra. slip. op. 48, and held that "specific direction to an attorney regularly employed on a full-time basis by the Department of Justice need not be embodied in a single written authorization but may be implied from other writings, guidelines, practices and oral directions transmitted through a chain of command within the Department." Persico, supra. slip. op. 52.

5/ The defendant's suggestion (B. 47-48) that the facts of the instant case can be distinguished from the circumstances of Persico, supra. in that Persico was an "organized crime figure" while the defendant's case involved "mis-handling of funds" is unpersuasive. As this court noted in Persico. supra. slip. op. 9" some law enforcement officials believe that organized criminals . . . have moved into legitimate unions and businesses by force, by purchase, and by corruption of public officials." In any event, the degree of one's importance within circles of organized crime does not enhance or diminish the responsibility of a "special attorney" to prosecute violations of the federal criminal law as directed by his commission, the "Strike Force" operation and the Department of Justice. (Footnote cont'd)

In view of the fact that the "special attorney" in the instant case was operating under and within the same "Strike Force" control and organization as was the "special attorney" in Persico, supra. we submit that this Court's decision in Persico, supra. fully supports the authority of the special attorney in the instant case to conduct the challenged grand jury proceedings.

CONCLUSION

It is therefore respectfully submitted that the judgment of conviction should be affirmed.

DAVID G. TRAGER,
United States Attorney,
Brooklyn, New York 11201.

DONALD F. McCAFFREY,
THOMAS GOLDSTEIN,
Special Attorneys,
Department of Justice,
Brooklyn, New York 11201.

JEROME M. FEIT,
DAVID E. ROSEBERRY,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

5/ (Footnote cont'd.)
For an even a broader view of the authority of a "special attorney" see Eighth Circuit's opinions in United States v. Agrusa, (8th Cir. July 18, 1975); DiGirlomo v. United States, (8th Cir. July 18, 1975); United States v. Wrigley, (8th Cir. July 18, 1975).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for Appellee have been served upon the attorneys for appellant at the following addresses:

Raymond B. Grunewald, Esq.
GRUNEWALD, TURK, GILLEN & FORD
Woolworth Building
233 Broadway
New York, New York 10007

Joseph Beeler, Esq.
407 Lincoln Road-Suite 12D
Miami Beach, Florida 33134

Dated this 25th day of July, 1975.

DAVID E. ROSEBERRY,
Attorney,
Appellate Section,
Criminal Division